Office Supreme Court, U.S.
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NO. 433

IN THE

Supreme Court of The United States

_____ Term, A.D., 1963

GEORGE TYLER,
Petitioner,

VS.

STATE OF WEST VIRGINIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Petitioner, George Tyler, prays that a Writ of Certiorari be issued to the Supreme Court of Appeals of West Virginia to review the judgment of that Court entered in the case styled State of West Virginia versus George Tyler.

JURISDICTION

The defendant was indicted in Harrison County, West Virginia, and convicted of the felony of obtaining money or thing of value by virtue of false and fraudulent pretenses. Upon petition for writ of Error both the Circuit Court of Harrison County, West Virginia, and the Supreme Court of Appeals of West Virginia

refused to entertain defendant's petition. The grounds for invoking the jurisdiction of this Court are two, namely, there was no evidence offered on behalf of the State of West Virginia which would be sufficient in law to sustain the conviction, hence, defendant was denied due process of law; and second, the defendant was not afforded the right to be present at every stage of the proceedings the record not revealing his presence, hence a denial of due process in this regard. (Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.)

JUDGMENT BELOW

The judgment of conviction of your petitioner was entered on the 21st day of September, 1961, by the Criminal Court of Harrison County, West Virginia: By order entered November 30, 1962, the Circuit Court of Harrison County, West Virginia, rejected your petitioner's application for writ of error and thereby affirmed the judgment of the Criminal Court. On June 10, 1963, the Supreme Court of Appeals of West Virginia likewise rejected petitioner's application for review thereby perpetrating the errors of the lower Courts.

QUESTIONS PRESENTED

1. Was defendant denied due process of law within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution by the failure of the Criminal Court to direct a verdict of acquittal; there being no evidence adduced sufficient to sustain his conviction?

2. Was defendant denied his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution, the record failing to reveal his presence at every stage of the trial in the Criminal Court?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5 provides in part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ."

Amendment 6 provides in part:

> "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Amendment 14 provides in part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; . . . ."

STATEMENT OF CASE

The defendant, George Tyler, was indicted by a Grand Jury at the March, 1961, Term of the Criminal Court of Harrison County, West Virginia. Defendant was arraigned and plead not guilty to the charge of obtaining a check from one Marshall Goff, by virtue of false and fraudulent pretenses. He was tried and the jury rendered a verdict of guilty. Defendant was sentenced to from one to five years in the penitentiary. Defendant offered no witnesses at the trial and

throughout maintained that the State had offered no evidence sufficient to sustain a conviction. His conviction and sentence has been affirmed by the highest appellate court of the State of West Virginia.

The most favorable case for the State of West Virginia as adduced upon the trial would appear to be the following:

1. In November, 1959, a person named Archie Goldfon, entered into an agreement with Marshall Goff, the prosecuting witness, to do certain home remodeling work for Marshall Goff for $3,450.00 and at that time Goff signed blank copies of a contract and note which were introduced into evidence later by the State, which documents were filled in when introduced. Goldfon had advised Goff that the work would be financed. The note executed by Goff had "Universal C. I. T." on the upper left hand corner and on the back of the note was a printed endorsement as follows:

"Without recourse pay to the order of Universal C. I. T. Credit Corporation."

(As is usually done by remodeling contractors, G. T. Aluminum Company borrowed against the note and contract from Universal CIT Credit Corporation an amount sufficient to do the work, for working capital, until prosecuting witness Goff paid the amount due or financed the amount himself.)

2. Later the defendant was at the Goff home and Goff mentioned to defendant that he had been notified by Universal CIT Credit Corporation, that his account had been financed with that concern and that he, Goff, may want to take care of the financing himself and

defendant allegedly advised Goff, "I will take care of it."

3. Goff testified later that he again inquired of defendant at a later date with regard to the financing and the defendant is alleged to have said "I have taken care of it"; and that on December 15, 1959, Goff asked defendant if he would pay cash, could he get a reduction and defendant agreed to take $3,000.00, of which amount Goff gave to defendant a check for $1600.00 and agreed to pay $1400.00 within 45 to 60 days. The $1400.00 was never paid by Goff, or any other person to the defendant or to anyone for defendant.

Goff testified he would not pay the balance of $1400.00 until a release was obtained and delivered to him from Universal CIT Credit Corporation; and that this was the understanding between him and the defendant on December 15, 1959, when he gave defendant his check.

4. The only admissible evidence identifying Goldfon is from Goff, himself, that Goldfon was a representative of the Universal CIT Credit Corporation, and nowhere is there any admissible evidence connecting Goldfon with the defendant. There is a hearsay statement, objected to by defendant, that Goldfon represented to be an employee of G. T. Aluminum Company.

The State took the position that the false pretense upon which defendant could be convicted was his statement to Goff, "that he had taken care of it" (the "it" apparently meaning the Universal CIT Credit Corporation financing account). The evidence shows that Goff has not paid the balance of $1400.00 and that the defendant paid the entire $1600.00 that had been de-

livered to him by Goff, to Universal CIT Credit Corporation long before any charges or claims were made against him and that he, defendant, later paid off the entire account to Universal CIT Credit Corporation before he had any notice of indictment or warrant; the evidence is equally clear that Goff owes defendant the sum of $1400.00 plus interest, carrying charges, finance charges and credit life charges.

The defense called no witnesses and took the position at the trial that the essential allegations of the indictment were not proved, that no evidence was introduced to prove that defendant had made representations that he was an agent of Universal CIT Credit Corporation, or that he was authorized to collect a lesser sum or that he had paid off Universal CIT Credit Corporation. All motions made on behalf of defendant were overruled and defendant was found "guilty as charged in the within indictment".

The question of there not being sufficient evidence to sustain the conviction was raised in the first instance in the trial court by the motions of the accused for directed verdict of acquittal and by motion to set aside the verdict and award the accused a new trial. The same grounds asserted in these motions were asserted in both the Circuit Court of Harrison County, West Virginia, and the Supreme Court of Appeals of West Virginia by way of assignment of error. The question with regard to the absence of the accused was not raised in either the trial court or the circuit court but was raised in the Supreme Court of Appeals of West Virginia by way of assignment of error.

RULING OF THE COURT BELOW

The Supreme Court of Appeals of the State of West Virginia having denied your petitioner's application for writ of error, has thereby affirmed the rulings and errors of the Circuit and Criminal Courts of Harrison County, West Virginia, denying unto your petitioner his constitutional rights.

POINTS RAISED FOR ALLOWANCE OF WRIT

1. Conviction not supported by any sufficient evidence denies accused due process of law.

2. Conduct of Part of Trial out of Presence of Accused, the record not showing his presence violates accused's rights under the Sixth and Fourteenth Amendments.

ARGUMENT

1. The conviction of this defendant not supported by evidence sufficient to sustain a conviction denied this defendant of due process of law.

The "Statement of the Case" hereinbefore sat out presents the evidence adduced which was most favorable to the State. That evidence is not sufficient to sustain a conviction of your petitioner.

It was held in Brooks v. United States, 164 F 2d 142 (Cir. Ct. of Appeals 5th Cir. Ga.) (1947) which was a case wherein appeallant and others were charged with a conspiracy to violate internal revenue laws that "due process as to each defendant required for a conviction

that the evidence *be strong enough* to exclude every other reasonable hypothesis than the guilt of that defendant of the precise conspiracy charged . . ." (Emphasis Supplied.)

An excellent general statement of the law in this regard is found in 16A C.J.S., Constitutional Law, Sec. 589, pp. 645, 646.

It is there stated:

> "The presumption of innocence is an essential of due process of law; and due process requires that accused, after a plea of not guilty, shall not be put on his defense or deprived of his liberty until the state has produced evidence tending to prove that the crime charged has been committed and tending to connect accused with the commission thereof, and that he shall not be convicted until the state, by evidence establishing guilt beyond a reasonable doubt, has made out its case and removed the presumption of innocence. The constitutional guaranty of due process requires adherence to the adopted and recognized rules of evidence in trials."

This Court held in *Thompson* v. *City of Louisville*, 362 U. S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624.

> "Thus we find no evidence whatever in the record to support these convictions. Just as 'conviction upon a charge not made would be sheer denial of due process,' so it is a violation of due process to convict and punish a man without evidence of his guilt."

2. The Right of a Defendant To Be Present at Every Stage of His Trial Is An Inalienable Right and The Record Must Show His Presence.

The transcript of the proceedings had in the Criminal Court of Harrison County, West Virginia, reveals the following:

At (T. 166).

> "Second Day, Tuesday, April 11, 1961, 9:00 a. m.
>
> Whereupon the trial was resumed pursuant to the adjournment of yesterday."

At (T. 213)

> "In the Court's Chambers out of the hearing of the jury on consideration of instructions."

The following cases decided by the Supreme Court of Appeals of West Virginia reflect the necessity of accused's presence at every stage of the proceedings, and in addition many announce the rule that the record must show the accused's presence:

The case of *State* v. *Stevenson*, 64 W. Va. 392, 62 S.E. 688 (1908) was a murder case; the trial was heard by a special judge; the regular judge came back and assumed the bench and heard sworn statements of witnesses who had testified at the trial, the defendant not being present. This Court said at page 690 of the Reporter:

> " . . . for we have held that the prisoner must be present during the whole of his trial, *a constitutional right which cannot be waived or taken away from him by the court.*. Younger v. State, 2 W. Va. 579, 98 Am. Dec. 791; State v. Conkle, 16 W. Va. 736; State v. Sutfin, 22 W. Va. 771; State v. Greer, Id. 800; State v.

> Parsons, 39 W. Va. 464, 18 SE 876; State v. Sheppard, 49 W. Va. 582-611, 39 SE 676 . . ."

The case of *State* v. *Sheppard*, 49 W. Va. 582, 39 S.E. 677 (1901) was also a murder case. The court's opinion at page 688 reveals that a witness was asked her name and the name of her husband out of the accused's presence and the court stated, "This was a fatal eror, for which the judgment must be reversed, the verdict set aside, and a new trial granted." No objection or exception was taken at the time, but after the verdict was brought in, the prisoner moved the court to arrest the judgment and set aside the verdict. At page 689 of the Southeast Reporter, this Court after citing numerous cases and quoting therefrom, quotes from Jackson's case:

> "We will not inquire whether the prisoner was unfavorably or otherwise affected by the cross examination of the witness in his absence. He had the right to be present, which he did not and could not waive. He had the right to observe every look gesture or move of the witness while he was testifying; and it mattered not that the court excluded the evidence and certified that it was repeated in his presence." From these authorities, it is clearly a matter of no consequence that the evidence introduced in this case in the absence of the prisoner may not have affected him and that he did not at that time taken an exception."

In the case of *State* v. *Howerton*, 100 W. Va. 501, 130 S.E. 655 (1925), also a murder case, the sole ground of error was the argument on and the acting upon of instructions in the absence of defendant. The two syllabus points set out at page 655 of the Southeastern Reporter are as follows:

Syllabus 1: "In felony cases, the accused must be present in his own proper person from the inception of the trial upon the indictment to the final judgment inclusive, when anything is done affecting him."

Syllabus 2. "Under this rule the prisoner should be present when the instructions are argued and acted upon by the court; and his absence at such time will constitute reversible error."

The Court in the *Howerton* case (supra) quotes from *State* v. *Parsons*, 39 W. Va. 464, 19 S.E. 876, as follows:

"The second ground on which the accused asks a new trial is that he was absent when the subject of a new trial was being considered. The Code in Section 2, Chapter 159, as well as the common law requires, that 'a person indicted for felony shall be personally present during the trial therefor.' What does the word 'trial' here used mean? Does it mean merely trial before the jury? Must he be present when a motion for a new trial is pending? Some authorities hold that he need not be; but the great weight of authority is that he must be so present when any step affecting him is taken from arraignment to judgment inclusive. Sperry's Case, 9 Leigh (Va.), 623 (33 Am. Dec. 261); Younger's Case, 2 W. Va. 579 (98 Am. Dec. 791); State v. Conkle, 16 W. Va. 736; State v. Sutfin, 22 W. Va. 771; State v. Greer, Id. (22 W. Va.) 801; Jackson's Case, 19 Gratt (Va.) 656; Lawrence's Case 30 Gratt (Va.) 763, it is pointedly held that the accused must be present during action on a motion for a new trial; so in Bond's Case, 83 Va. 581, 3 S.E. 149, *the record book must always show the prisoner's presence.*" (Emphasis supplied.)

In *State* v. *Snider*, 81 W. Va. 522, 94 S.E. 981 (1918), another murder case, a question was asked of a witness, an objection was interposed and the court, the witness and attorneys on both sides retired to an anteroom prior to the objection being ruled on. In the anteroom, the question together with others was asked and answered and the objection overruled; after the return to the courtroom, the witness answered the question. The court went on to say at page 985 of the Southeastern Reporter:

> "*It cannot be assumed or presumed that the prisoner accompanied the judge and attorneys when they left the courtroom. The record does not say so. On the contrary it impliedly says he did not. Naming those who went, it omits him. If he went along, the record should show the fact affirmatively.* Younger vs. State, 2 W. Va. 579, 98 Am. Dec. 791; State v. Conkle, 16 W. Va. 736; State v. Sutfin, 22 W. Va. 771." (Emphasis supplied.)

In *State* v. *Martin*, 120 W. Va. 229, 197 S.E. 727 (1938), a malicious wounding case, the sole ground for reversal is the absence of defendant while clerk called a panel of twenty jurors, swore them, and court conducted some voir dire. The absence of defendant was discovered, voir dire was suspended; jury was resworn and proceedings begun anew with defendant present. The court held at page 728 of the Reporter that because of non-compliance with Code 62-3-2 requiring the presence of the accused, the judgment must be reversed.

The syllabus by the Court is as follows:

> "In a felony case the accused must be present in person from the inception of the trial on the indictment to the final judgment when anything

is done affecting him; *and the record must show his presence.* State v. Parsons, 39 W. Va. 464, 19 S.E. 876." (Emphasis supplied.)

In *Dye* v. *Skeen*, 135 W. Va. 90, 62 S.E. 2d 681 (1950), a habeas corpus proceeding, the defendant had received a life sentence as an habitual criminal; the Circuit Court of Roane County in the absence of accused vacated a sentence of confinement in the West Virginia Industrial School for Boys. This Court discussed the absence of an accused at pages 686 and 687 of the Reporter as follows:

> "A person indicted for felony shall be personally present during the trial therefor." This requirement of the statute means that such person must be present in person when any step affecting him is taken from arraignment to final judgment inclusive. State v. Howerton, 100 W. Va. 501, 130 SE 655; State v. Stevenson, 64 W. Va. 392, 62 SE 688, 19 LRA, NS 713; State v. Sheppard, 49 W. Va. 582, 39 SE 676; State v. Parsons, 39 W. Va. 464, 19 SE 876; State v. Greer, 22 W. Va. 800; State v. Sutfin, 22 W. Va. 771; State v. Conkle, 16 W. Va. 736; Numerous decisions of this Court, recognizing and giving effect to the statute, hold that in a felony case the defendant must be personally present when anything is done affecting him, from the inception of the trial until the final judgment, *and that the record must show his presence.* State v. Howerton, 100 W. Va. 501; 130 SE 655; State v. Snider, 81 W. Va. 522, 94 SE 981; State v. Grove, 74 W. Va. 702, 82 SE 1019; State v. Sutter, 71 W. Va. 371, 76 SE 811; State v. Stevenson, 64 W. Va. 392, 62 SE 688; State v. Sheppard, 29 W. Va. 582, 39 SE 676; Younger v. State, 2 W. Va. 579, 98 Am. Dec. 791." (Emphasis supplied.)

In *State* v. *Vance*, W. Va. , 124 SE 2d 252 (1962) a rape case, the defendant walked out of the judge's chambers during the consideration of instructions; his absence was detected after he had been gone possibly four or five minutes. The case was reversed on this sole point.

Quoting from the opinion at page 258, et seq. of the Reporter:

> "Section 2, Article 3, Chapter 62, Code 1931, provides in part that 'A person indicted for a felony shall be personally present during the trial thereof.' This provision was incorporated in the Virginia Codes of 1849 and 1860 and has remained intact in the Codes of this State since the Code of 1868. In many decisions of this Court beginning with Younger v. The State, 2 W. Va. 579, 98 Am. Dec. 791, decided in 1868 and including Dye v. Skeen, 135 W. Va. 90, 62 SE 2d 681, 24 ALR 2d 1234, decided in 1950, this Court has held that this requirement of the statute means that such person must be present in person when any step affecting him is taken from arraignment to final judgment inclusive. Dye v. Skeen, 135 W. Va. 90, 62 SE 2d 681, (and numerous other cases cited). . .
>
> "Several of these cases holding that in a felony case the defendant must be personally present from the inception of the trial until the final judgment *and that the record must show his presence.* This Court has said that this provision of the statute has always been viewed as mandatory, that it will be strictly applied and enforced, and that the right which it safeguards to the accused of being personally present at all times during this trial has been deemed to be an inalienable right. State v. Howerton, 100 W.

Va. 501, 130 SE 655; State v. Grove, 74 W. Va. 702, 82 SE 1019.

. . .

". . . The right of one under indictment for a felony to be personally present at every stage of his trial cannot be denied him. *The statute has always been viewed as absolutely mandatory, even when it could be seen that no harm has come from its nonobservance.*" (Emphasis supplied.)

In *Hopt* v. *Utah*, 110 U. S. 574 (1884), the validity of the judgment of conviction was questioned upon the ground that a part of the proceedings in the trial court were conducted in the absence of the defendant. In that case, the defendant challenged certain jurors. Triers were appointed for each juror. The triers took the jurors from the Courtroom and tried the grounds of challenge out of the presence of the court, the defendant and the prosecution. Defendant made no objection nor was any exception taken by defendant during the trial. It was there held that defendant's failure to object did not constitute a waiver and that to deprive an accused of his life or liberty without his being present is a deprivation without that due process of law required by the Constitution.

In *Lewis* v. *United States*, 146 U. S. 370, 36 L. Ed 1011 (1892) wherein the Hopt v. Utah case was cited with approval this Court held that in felonies it is not in the power of the prisoner either by himself or his counsel to waive the right to be personally present during the trial and it was further held that the record must affirmatively show the prisoner's presence in Court.

3. The questions raised are of great general and public interest.

Certainly the authors of the Amendments to our Constitution intended that the safeguards of life, liberty, and the pursuit of happiness were the chief attributes of a free people, that these safeguards were to be most jealously guarded and that no man be he ever so small should ever in a free nation be deprived of these without due process of law. Hence were written the adopted Amendments 5, 6, and 14 of our Constitution.

The rules insisted on by your petitioner are fundamental and throughout the nation universally followed. May they remain the law.

CONCLUSION

It is respectfully urged that the 5th, 6th and 14th Amendments of our Constitution together with the precedents found within the realm of West Virginia law make it mandatory that the Supreme Court of West Virginia reverse the judgment of the Criminal Court of Harrison County, West Virginia, and return the same with instruction for acquittal, or in the alternative with direction for a new trial. We, therefore, respectfully submit that this Court should grant certiorari.

Respectfully submitted,

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and
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APPENDIX A

Order of the Circuit Court of Harrison County, West Virginia, entered November 30, 1962.

STATE OF WEST VIRGINIA,
Plaintiff,

v.

GEORGE TYLER,
Defendant.

Upon Conviction For A Felony No. 16110

ORDER REFUSING WRIT OF ERROR AND SUPERSEDEAS

The above-styled proceeding came on this day to be heard upon the petition of the defendant, George Tyler, for a writ of error and supersedeas to a judgment of the Criminal Court of Harrison County, West Virginia, rendered on the 21st day of September, 1961, which said petition together with the record of said proceeding was presented to the Circuit Court of Harrison County, West Virginia, on the 19th day of January, 1962, and the matters arising thereon were argued by counsel.

Upon consideration of all of which, the Court orders that said petition for a writ of error and supersedeas be and the same is hereby rejected, and the writ of error and supersedeas therein prayed for be and the same is hereby rejected.

And to the judgment of the Court in rejecting said petition and refusing said writ of error and supersedeas as prayed for, the defendant by his counsel duly excepted.

APPENDIX B

Order of the Supreme Court of Appeals of West Virginia entered June 10, 1963.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th day of June, 1963, the following order was made and entered, to-wit:

State of West Virginia

vs.

George Tyler

On a former day, to-wit, March 28, 1963, came the petitioner, George Tyler, by Stanley E. Preiser, and W. Dale Greene, his attorneys, and presented to the Court his petition praying for a writ of error and supersedeas to a judgment of the Circuit Court of Harrison County rendered in this case on the 30th day of November, 1962, with the transcript of the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the writ of error and supersedeas prayed for is refused. Judge Haymond absent.
A True Copy

Attest: KENNETH E. HINES,
Clerk Supreme Court of Appeals

APPENDIX C

Order of the Supreme Court of Appeals of West Virginia entered June 18, 1963.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 18th day of June, 1963, the following order was made and entered, to-wit:

State of West Virginia

vs.

George Tyler

On this day came the petitioner, George Tyler, by Stanley E. Preiser and W. Dale Green, his attorneys, and presented to the Court his motion in writing to stay the order of this Court entered herein on the 10th day of June, 1963, pending an application to the Supreme Court of the United States for an appeal in this case pursuant to the provisions of Code 58-5-31.

Upon consideration whereof, the Court is of opinion to grant the motion. It is therefore considered and ordered that the order of this Court entered herein on the 10th day of June, 1963, be stayed for a period of ninety days after the entry of said order, in order to permit the aforesaid petitioner to apply to the Supreme Court of the United States for an appeal or Certiorari herein, but this order is not to take effect until the petitioner, or some person for him shall have given before the Clerk of the Circuit Court of Harrison

County bond with good personal security in the penalty of ONE THOUSAND Dollars, conditioned according to law; all of which is ordered to be certified to the Circuit Court of Harrison County.

A true copy

Clerk Supreme Court of Appeals
Attest: KENNETH E. HINES,

PETITION FOR REHEARING

Office Supreme Court, U.S.
FILED
DEC 24 1963
JOHN F. DAVIS, CLERK

NO. 453

IN THE

Supreme Court of The United States

October Term, A.D., 1963

GEORGE TYLER,
Petitioner,

VS.

STATE OF WEST VIRGINIA,
Respondent.

Rehearing
ON PETITION FOR ~~RE-APPLICATION~~ FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

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NO. _____

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October Term. A.D., 1963

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VS.

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ON PETITION FOR RE-APPLICATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioner, George Tyler, prays that a Writ of Certiorari be issued to the Supreme Court of Appeals of West Virginia to review the judgment of that Court entered in the case styled State of West Virginia versus George Tyler.

JURISDICTION

The defendant was indicted in Harrison County, West Virginia, and convicted of the felony of obtaining money or thing of value by virtue of false and fraudu-

lent pretenses. Upon petition for writ of error, both the Circuit Court of Harrison County, West Virginia, and the Supreme Court of Appeals of West Virginia refused to entertain defendant's petition. The grounds for invoking the jurisdiction of this Court are (1) the defendant was denied due process of law in that he was not informed of the nature and cause of the accusation against him, and was specifically denied due process in that the allegations as contained in the indictment were at total and material variance with the proof offered by the State, thereby preventing to the defendant a fair and impartial trial within the meaning of the due process provisions of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, all of which said amendments are made applicable to the several states by virtue of this Court's decision in *Betts* v. *Brady*, 316 U.S. 455 and *Mapp* v. *Ohio*, 81 S. Ct. 1684 (1961); and (2) There was no evidence offered on behalf of the State of West Virginia which would be sufficient in law to sustain the conviction of this defendant, hence defendant was denied due process of law within the meaning of the Fourteenth Amendment to the United States Constitution; (3) Defendant was denied equal protection of the law as required by the Fourteenth Amendment to the United States Constitution by the action of the Circuit Court of Harrison County, West Virginia, and the Supreme Court of Appeals of the State of West Virginia, in those Court's failure to apply to this defendant's case the rules of law as to evidence and criminal procedure afforded to

the defendants in other criminal cases who were awarded new trials because of error perpetrated by trial courts.

JUDGMENT BELOW

The judgment of conviction of your petitioner was entered on the 21st day of September, 1961, by the Criminal Court of Harrison County, West Virginia: By order entered November 30, 1962, the Circuit Court of Harrison County, West Virginia, rejected your petitioner's application for writ of error and thereby affirmed the judgment of the Criminal Court. On June 10, 1963, the Supreme Court of Appeals of West Virginia likewise rejected petitioner's application for review thereby perpetrating the errors of the lower Courts. On September 9, 1963, the petition of this defendant for a Writ of Certiorari to the judgment of the Supreme Court of Appeals of West Virginia, was filed and on December 2, 1963, said petition was denied. Petitioner here seeks on re-application a Writ of Certiorari to the judgment below.

QUESTIONS PRESENTED

1. Was defendant informed of the nature and cause of the accusation against him, the record bearing out a material variance of the allegations of the indictment and the proof as offered by the State.

2. Was defendant denied due process, there being no sufficient evidence to sustain his conviction.

3. Was defendant denied equal protection of the laws within the meaning of the Fourteenth Amendment when the Circuit Court of Harrison County, West Virginia, and the Supreme Court of Appeals of West Virginia, refused to entertain his petition for a Writ of Error, which said petition set forth matters clearly held reversible error in other criminal cases decided by said State Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5 provides in part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Amendment 6 provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him. . . ."

Amendment 14 provides in part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." . . . nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS REFERRING TO TRANSCRIPT

On November 3, 1959, one Archie Goldfon, visited the complaining witness, Marshal Goff, and discussed with Goff the improvement of the Goff home (T31). It is admitted by Goff that an agreement to repair his home was entered into between he and Goldfon and that he executed and delivered to Goldfon a contract and note. He further admits that a stipulated price for the work was agreed upon. (T-31-32) (T88) All these matters were agreed upon with a party known as Archie Goldfon and Goff further admits that the transaction was to be financed. (T32)

No where in the record does it appear who Archie Goldfon was, with the exception of two hearsay statements: the first, objected to and overruled, on page 32 of the transcript as follows:

> "Q. Mr. Goff, who did Archie Goldfon represent he was, was he in business or did he work for someone else?
>
> Objected to. Overruled.
>
> Exception.
>
> "A. He represented to be working for the G. T. Aluminum Company."

and the other on page 77 of the transcript when Marshal Goff on cross examination testified as follows:

> "Q. Who is Mr. Goldfon?
>
> "A. He represented himself to me to be manager of the Universal CIT Credit Corporation in Pittsburg."

After the execution of the note and contract by Goff and the delivery of these instruments to Mr. Goldfon, defendant visited the Goff property quite often in a supervisory capacity, i.e., overseeing the work. (T 95-96)

At page 90 of the transcript Goff testified that on the 5th or 6th of November he and defendant discussed a reduction in price if cash were paid.

> "A. *I asked him* if I would pay cash if it would be a difference in the price on it, he talked a little while and he said if I would pay cash for it that it would be $3200.00, that he would knock off the $250.00. (Emphasis supplied)
>
> "Q. This was on November the 5th and November the 6th.
>
> "A. Along the first of November."

Sometime in November, 1959, Goff received a payment book from Universal CIT Credit Corporation and claims that not later than the 15th of November he discussed the payment book with defendant. (T51) For the first time the record reveals on page 51 of the transcript that Goff claimed the transaction was not to be financed; this is, of course, contrary to his testimony at (T32) that he and Goldfon agreed that it was to be financed. Of further significance is the fact that the note contained in its upper left hand corner "Universal CIT" and on its back the printed endorsement without recourse pay to the order of Universal CIT Credit Corporation. (See plaintiff's Exhibit Promissory Note and Endorsement)

At the time of this discussion defendant is alleged to have stated with regard to the Universal CIT Credit Corporation Financing, "I will take care of it."

(T51)

"Q. After you received the payment book, did you have a conversation with the defendant George Tyler relative to these papers which you had received from the Universal CIT Corporation?

"A. Mr. Tyler came down and I showed him the papers and asked him about them and told him we were to pay cash for the job when it was completed, or within 45 to 60 days after completion, and that it was not to be financed, and he said don't worry about it, *I will take care of it*". (Emphasis supplied)

"Q. When did that conversation take place?

"A. That was in November.

"Q. What part of November the best you can remember?

"A. Not later than the 15th."

Goff testified about a second conversation with defendant four or five days after the hereinabove conversation. At page 52 of the transcript:

"Q. How long after the first conversation was the second one?

"A Four or five days.

"Q. And what was the conversation on that occasion, what did you say and what did the defendant, George Tyler, say?

The defendant on this occasion, presumably the 19th or 20th of November, 1959, is alleged to have engaged Mr. Goff in the following conversation:

At (T53):

"Q. Did George Tyler make any statement in this connection as to what if anything had been done with reference to the Universal C.I.T. Corporation?

"A. He said he had taken care of it.

"Q. In what month and year did that conversation take place?

"A. That would have been in November of 1959."

The indictment herein charges that defendant on "the day of December, 1959, George Tyler did". Looking to Goff's testimony relative to the month of December, 1959, we find:

At (T53-54)

"Q. Do you recall the occasion in December when you and Mr. Tyler made some arrangement relative to payment for this work.

"A. On the 15th of December Mr. Tyler came down and they wanted to run the concrete porch, lay blocks on the porch prior to that, and it was freezing weather and I wouldn't let them do anything, told him I would like to hold the cement work up, didn't want it done until the freezing weather stopped, and *Mr. Tyler agreed to come down to $3200.00 on the contract on the house for this work if I would pay cash*; and he came on the 15th of December and told me that if I would finish the porch, lay the blocks and run the concrete on the porch, that he would cut the job $3000.00, and wanted to know what part of it . . . . . (emphasis supplied)

"Q. *Did you agree to that?**

"A. *I did.**

"Q. Did you have any discussion about the money?

"A. Yes sir, he asked me when I could pay for it, the $3,000.00, and I told him I could give him a check for $1600.00 then and the other $1400.00 in 45 to 60 days, and he agreed to it.

"Q. Did you give him such a check?

"A. I did.

"Q. On that day, that is the 15th of December, 1959.

"A. Yes sir."

The witness, Goff, on cross examination, testifying with regard to occurrences between he and defendant in the month of December, 1959 at (T108 thru 111):

"Q. On the 15th day of December, you and Mr. Tyler at your home had another financial understanding didn't you?

"A. Yes sir.

"Q. That was a financial understanding whereby you were to pay $3,000.00 in cash?

"A. Within 45 to 60 days.

"Q. And it was at that time that you gave him your check marked, or dated rather, December 15, 1959?

"A. Yes sir.

"Q. And that was for $1600.00?

"A. That is right. (T108-109)

* * *

*Emphasis supplied.

"Q. Now what was Mr. Tyler supposed to do to get the balance? (T109)

* * *

"A. Yes sir, give me a release, a statement from the Finance Company; that they had no liens against the property.

"Q. You mean the Universal CIT Credit Corporation?

"A. Yes sir.

"Q. And that was the understanding you made with him on the 15th day of December, 1959, is that correct?

"A. Yes sir."

At (T111): the witness, Goff, testified,

"A. . . . . I would not have paid it until he produced a release from the Universal C. I. T. Corporation and the G. T. Aluminum Company.

"Q. That was the understanding on the 15th of December?

"A. Yes sir, but he told me that he had taken care of it when he was there before the 15th back in January of 1959, November of 1959.

"Q. He told you in November of 1959 he had taken care of the Universal C. I. T. Corporation?

"A. Yes, Sir, when he took the papers up, picked the papers up and took them with him . . . the payment book . . . ".

Therefore from the record it is impossible to pin-

point the date the defendant made the alleged statement that "he had taken care of it".

At (T101-102):

Goff testified on cross examination:

"A. Didn't understand he was to get it for me. The finance papers he was supposed to have taken care of them. Mr. Coffindaffer said he would have to have a release or a statement from the Universal C. I. T. Corporation. I had told him about the papers and *that Mr. Tyler had taken them and said he was taking care of them . . .*"*

"Q. When did Mr. Coffindaffer give you that information?

"A. *Along the first of January* when I talked to him about the loan . . ."*

While Mrs. Ellen Goff, the wife of the prosecuting witness pin-points the date of the alleged misrepresentation as December 15, 1959 (T173) it is significant that the prosecuting witness, Mr. Goff, places the alleged statement in November of 1959.

The evidence is clear that Mr. Goff did not pay cash as provided in his contract agreement and that he had not at trial time paid the $1400.00 balance. (T110) At (T113) Goff testified that he had paid Universal CIT nothing and admits that between December 15, 1959, and March of 1960, someone had been paying the CIT Corporation.

The transcript shows at page 132 and 133 that defendant in March, 1961, paid off the balance due the

*Emphasis supplied.

Universal CIT Credit Corporation in full; and at page 156 that "aside from one period June 21st to August 15, 1960, the note was paid in accordance with its terms." At page 143 of the transcript the witness, Craig, testified that "through August 30, 1960, there had been payments totalling $1600.00 paid" to Universal CIT Credit Corporation on the Goff indebtedness.

From the foregoing exerpts from the evidence the following statement of defendant's position is here inserted to assist the Court.

1. There was no intent on the part of defendant to defraud as evidenced by the testimony of Goff that the reductions in price, and payment in cash, at that time, were made at his (Goff's) instance. At page 90 of the transcript:

> A. I asked him if I would pay cash if it would be a difference in the price on it: . . ."

and further from the fact that defendant paid over all monies received from Goff to the Universal CIT Credit Corporation.

2. There was no reliance on the alleged fraudulent representation as evidenced by Goff's testimony that the understanding at the time he gave defendant his check for $1600.00 was that the balance of $1400.00 would be paid when a release from Universal CIT Credit Corporation was delivered to Goff; and further by Goff's telling Mr. Coffindaffer in January, 1960, that defendant had stated "he was taking care of them". If Goff was relying on defendant's statement

"I have taken care of it" he would not have been waiting on the release from Universal CIT Credit Corporation.

3. There was no actual fraud. The record reveals that Mr. Goff received credit from Universal CIT Credit Corporation for the full $1600.00 paid to defendant and the defendant received no benefit but to the contrary has lost $1400.00 on the transaction; which $1400.00 the prosecuting witness still owes to defendant.

4. The defendant was not present and the record fails to show his presence at all stages of the proceedings.

5. The State failed to prove the allegations made in the indictment.

6. The State failed to show the true intent of the parties when the alleged statement "I have take care of it" was made.

7. Defendant was prejudiced by the introduction of prejudicial and improper evidence over his objection.

8. The defendant was prejudiced by improper and prejudicial argument made by the State's Attorney.

9. The State failed to prove the corpus delecti.

10. The State failed to show any false pretense of a present material fact.

11. The trial court erred in refusing to dismiss the indictment as fatally defective.

12. The State failed to establish beyond reasonable doubt each and every material essential element of the offense.

RULING OF THE COURT BELOW

The Supreme Court of Appeals of the State of West Virginia having denied your petitioner's application for writ of error, has thereby affirmed the rulings and errors of the Circuit and Criminal Courts of Harrison County, West Virginia, denying unto your petitioner his constitutional rights.

POINTS RAISED FOR ALLOWANCE OF WRIT

1. Defendant was denied due process of law in that he was not informed of the nature and cause of the accusation made against him.

2. Defendant's conviction, not supported by any sufficient evidence denied this defendant of due process of law.

3. Failure of the Supreme Court of Appeals of West Virginia to reverse the judgment of the trial court denied this defendant equal protection of the laws.

ARGUMENT

a. The proof as offered by the State is at fatal variance with the charges made against defendant in the indictment.

b. There is no allegation in the indictment of the alleged false pretense relied on by the State at the trial.

c. There was no evidence to substantiate the charges made by the indictment.

d. The evidence conclusively shows that the defendant turned over the money given to him by the prosecuting witness to the Universal CIT Credit Corporation to be applied on the debt of the prosecuting witness to Universal CIT Credit Corporation.

e. The State failed to prove the corpus delecti.

f. The proof as offered by the State fails to establish beyond reasonable doubt any false pretense or representation made by defendant.

g. The evidence of the State fails to establish beyond a reasonable doubt any criminal intent on the part of defendant.

h. The proof as offered by the State fails to show that the prosecuting witness was actually defrauded.

i. The State offered no admissible evidence that defendant was not authorized to deal with Goff and accept payment from him.

j. The proof offered by the State established that defendant did nothing more than collect a part of a debt justly owing by the prosecuting witness, Goff.

k. The proof of the State conclusively shows that on December 15, 1959, when Goff gave defendant his check for $1600.00, the witness Goff, did not believe nor rely on any alleged representation of defendant, but to the contrary was not going to pay until a release was received from Universal CIT Credit Corporation.

l. Any representations of defendant were that something would be done in the future, and not of a present fact and therefore defendant could not be guilty of obtaining money or property by false pretenses.

m. Any representations of defendant were that something would be done in the future, and not of a present fact and therefore defendant could not be guilty of obtaining money or property by false pretenses.

n. The trial court committed reversible error in permitting the State's attorney to indulge in improper and prejudicial argument, and in permitting the State's attorney to misstate the evidence over the objection of defendant.

o. The indictment herein was fatally defective for the following reasons:

a) The indictment is undated and does not show any date when found;

b) The charges in the indictment are at fatal variance with the proof.

The indictment charges as follows:

> "... that George Tyler, *on the day of December, 1959, in said County of Harrison did ... falsely pretend and represent to Marshal Goff that he, George Tyler, had paid off the negotiable promissory note dated November 6, 1959, made by Marshal H. Goff and Ellen Goff, payable to the order of the G. T. Aluminum Company for Four Thousand Six Hundred Fifty Seven Dollars and twenty cents (4,657.20), said note having been endorsed, without recourse, by said G. T. Aluminum Company to the Universal CIT Credit Corporation, and that he, the said George Tyler, was authorized by said Universal CIT Credit Corporation, to collect said sum from Marshal H. Goff, and was authorized to discount said sum and to accept a smaller amount in full settlement and payment of said negotiable promissory note and indebtedness if paid to him at that time;* that by means of the aforementioned false and fraudulent pretense ... George Tyler then and there well knowing he was not the representative, agent and employee of said Universal CIT Credit Corporation and that said representations were fraudulent and false did ... obtain a check of and from ... Marshal H. Goff dated December 15, 1959, calling for the sum of Sixteen Hundred Dollars ($1600.00) drawn on the Empire National Bank of Clarksburg, Clarksburg, West Virginia, and payable to the order of G. T. Aluminum Company and made and signed by the said Marshal H. Goff ..." (Emphasis supplied).

The following variances between the charges made in the indictment and the proof are here set out:

a. The indictment charges the representations to have been made on the day of December, 1959; the proof of the State shows that the statement relied upon by the State as the basis for their case to have been made, if made at all, in November, 1959.

b. The indictment charges that defendant represented he "had paid off the negotiable promissory note . . ."; the proof of the State at best shows an alleged statement "I have taken care of it".

c. The indictment charges that defendant represented he had paid off the negotiable promissory note dated the 6th day of November, 1959, made by Marshal H. Goff and Ellen Goff payable to the order of G. T. Aluminum Company for Four Thousand Six Hundred Fifty Seven Dollars and twenty cents ($4,657.20) said note having been endorsed without recourse by said G. T. Aluminum Company to the Universal GIT Credit Corporation". The note submitted into evidence as "Pit. ex. Promissory Note" is a note made by "Marshal H. Goff, Ellen Goff, William R. Lewis, Barbara C. Goff Lewis payable to "G. T. Aluminum Co." and bears date "11-6-59"; the endorsement is by "G. T. Aluminum Co.";

d. The indictment charges that defendant obtained from Goff a check described therein as follows: "Dated December 15, 1959, calling for the sum of Sixteen Hundred Dollars ($1600.00) drawn on the Empire National Bank of Clarksburg, Clarksburg, West Virginia, and payable to the order of G. T. Aluminum Company

and made and signed by the said Marshal H. Goff"; the check offered into evidence by the State bears date "*12-15-59*" and is payable to "*G. T. Aluminum Co.*"

e. There is no proof whatever that defendant either represented that he had paid off any note, or that he represented that he was authorized to collect $4,657.20, or that he represented he was authorized to accept a smaller amount in full settlement and payment of said note, or that he was authorized to discount $4,657.20, or that he was a representative, agent or employee of Universal CIT.

It is significant that the State's attorney announced to the court that the false pretense upon which he relied for conviction was the statement "that he had taken care of it".

At (T202):

"The Court: Is that the false pretense you are relying on, that it had been taken care of?

"Mr. Hutton: Yes sir . . . ."

The burden is upon the State to prove each and every element of the offense charged beyond a reasonable doubt.

It is urged that the variance was properly raised below upon the motion to dismiss the indictment and to set aside the verdict, but even if this were not so, the variance points up the State's failure to sustain the burden of proof.

To constitute the crime of obtaining a thing of value

by false pretenses, the State must prove beyond reasonable doubt the following:

1. An intent to defraud;

2. An actual fraud perpetrated;

3. False pretenses used for purpose of perpetrating the fraud; and,

4. A reliance upon the representation which induced the prosecuting witness to part with the thing of value.

(See *State* v. *Pishner*, 72 W.Va. 603, 78 S.E. 752 (1913); *State* v. *Hurst*, 11 W.Va. 54.)

On the question of intent to defraud the evidence in the Court below reveals that certain work was done on the home of the prosecuting witness, Goff, for which he agreed to pay. The record reveals that Goff in the initial arrangements dealth with a party known as Archie Goldfon, who from the record so far as Goff or we know was a representative of Universal CIT Credit Corporation; Goff admits that he and Mr. Goldfon agreed the work was to be financed; the evidence of the State further shows that the papers, ie. the note and the contract for remodeling, signed by Goff were on forms supplied by Universial CIT Credit Corporation and were so marked.

The evidence then reveals that Goff sometime after his initial agreement with Goldfon and without knowledge on the part of defendant determined that he did not want to finance the work through Universal CIT Credit Corporation. As a business man would, in attempting to satisfy his customer defendant stated "I

will take care of it". Sometime after this statement, but not later than the 20th of November, 1959, while discussing the financing again, defendant is alleged to have said "I have taken care of it". *There is no evidence in the record to indicate what this statement, if made, meant.* There is no evidence in the record to prove that George Tyler had not made arrangements with Universal CIT Credit Corporation to stand good for the debt nor is there any admissible evidence that he had not been authorized by Universal CIT to accept payment or enter into a compromise settlement. The sole testimony relative to defendant's authority from Universal CIT Credit Corporation came from Lloyd Craig who testified defendant was not so authorized. This testimony was objected to and amounted to a witness offering a legal conclusion, highly improper and highly prejudicial to defendant. The State with this particular witness, Craig, failed to pay a proper foundation for the inquiry and did not show that the authorization, if given by Universal CIT Credit Corporation to defendant, would of necessity have had to come from the witness, Craig; neither did the State show that witness, Craig, would of necessity have known if some other person and proper representative of Universal CIT Credit Corporation had authorized defendant to accept payment from Marshal Goff.

As a factual matter there is no evidence that the defendant had not "taken care of it"—for he may have taken care of whatever "it" was.

In addition the prosecuting witness, Goff admits that it was at his instance that defendant agreed to reduce the price if Goff would pay cash. There is no question Goff owed a debt and there is no evidence of any intent

on the part of defendant other than to pay over to Universal CIT money as he received it from Goff, on the admitted indebtedness of Goff.

The record reveals that the full $1600.00 received from Goff was paid by defendant to Universal CIT and this long before any warrent or indictment was issued or returned.

The witness Craig testified that as of August 30, 1960, $1600.00 had been paid and that as of that date the note was paid in accordance with its terms.

There is absolutely no evidence in this case as to what was intended by defendant's remark, if made, that he had taken care of it. If we assume that the remark was made, what evidence is there that it was false? In order for it to be false it would have to be accepted that "I have taken care of it" can only have a sole meaning of I have paid off the note.

It is respectfully submitted that such statement "I have taken care of it" is susceptible of numerous interpretations; it might mean that a person has arranged to have the matter held in abeyance; it might mean that a person has agreed himself to stand behind an obligation in the event the party owing it defaults; it might further mean that the party making such statement had arrived at an understanding with the Company owed that he would pay monies he received from the owing party to the Company owed.

It is defendant's position the State has failed in the burden of showing beyond a reasonable doubt either that the alleged pretense was false or that defendant

had any intent to defraud. The records herein shows no admissible evidence that the alleged statement meant anything other than anyone of the numerous interpretations that could be encompassed by such statement; there is no affirmative evidence anywhere that Marshal Goff believed it to mean the note had been paid off by defendant. As a matter of fact, Marshal Goff was never asked what the alleged statement meant.

It is incumbent upon the State in a criminal prosecution to prove beyond a reasonable doubt each and every element of the offense charged. *State* v. *Hurst*, 11 W.Va. 54.

The charges against defendant are that in December 1959 he did certain things.

The conflicting evidence reveals that the statement relied on by the State if made at all was made in November 1959. Of particular significance is the fact that the prosecuting witness, Goff told Mr. Coffindaffer in January, 1960, after the check was given to defendant, that defendant had said *"he was taking care of them."* (Emphasis supplied)

The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. *U. S.* v. *Goodwin*, (Va.) 49 F.Supp. 510.

It is respectfully submitted that the State's proof herein was deficient: The indictment herein does not charge defendant with representing that he had taken

care of it; the indictment charges that defendant among other things, represented he had paid a certain note; the note introduced into evidence by the State, however, does not conform with the note described in the indictment as made by Marshal Goff and Ellen Goff, the note introduced into evidence had four (4) makers, was payable to quite possibly a different concern, and bore a numerical date not a spelled out month. While it is true that William Goff and Barbara Goff denied their signatures on this note, there is no evidence in the record that there does not exist a distinct and separate negotiable note as described in the indictment, which if turned up might be the subject of another charge against defendant that he made representations with regard to its payment.

This cannot be discounted inasmuch as the indictment herein charges defendant with having obtained a check for $1600.00 payable to the "G. T. Aluminum Company" dated "December 15, 1959". The check introduced into evidence, however, is payable to the "G. T. Aluminum Co." and is dated "12-15-59".

It is the position of defendant that the State is deficient in proving his guilt beyond a reasonable doubt by charging him with having falsely represented to have paid off a certain note; and then merely offering proof that he stated "he had taken care of"; the "it" presumably referring to the note offered in evidence which could well be an entirely different note; nor can the State charge that defendant obtained one check and offer proof as to what legally may be an entirely different check, and sustain its burden of proof.

There is no evidence in the record to determine the nature of entity, corporation or otherwise of the G. T.

Aluminum Company, or of the G. T. Aluminum Co. Can the State assume that there was but one entity and that "G. T. Aluminum Company" and "G. T. Aluminum Co." are one and the same?

In *State* v. *Crowder*, W.Va. , 123 S.E. 2d 42 (1961) it is stated:

> "If an indictment alleges that an offense was done in a particular way, the proof must support such charge or there will be a fatal variance . . ."

In the instant case, defendant is alleged to have falsely represented he had paid off a particular note and is alleged to have obtained a certain check, and to have represented falsely the following:

1. That he was authorized by Universal CIT Credit Corporation to collect Four Thousand Six Hundred Fifty Seven Dollars and twenty cents ($4,657.20);

2. was further authorized to discount $4657.20 and accept a smaller sum;

3. that he was a representative, agent and employee of Universal CIT Credit Corporation.

The Court in *State* v. *Crowder*, W.Va. , 123 S.E. 2d 42 (1961) at pp. 58 and 59 speaking in terms of the allegations contained in the indictment and the requirement of proof beyond a reasonable doubt said:

> "The indictment alleges facts to indicate the automobile was the 1958 Chrysler, although it was not specifically described as such. There is no direct proof in the entire record to show the defendant was talking about the 1958 automobile when he testified before the grand jury . . .

> "From the fact and circumstances, indicated by the record of the trial of this case, we are of the opinion that the State failed to prove that the defendant was guilty of the alleged false swearing beyond a reasonable doubt as required in such cases."

The Crowder case is here cited for the principle that where there is a variance between the allegations and the proof, the facts and circumstances must be scrutinized as they bear on the State's burden of proving defendant's guilt beyond reasonable doubt.

There is no allegation in the indictment that this defendant falsely represented "he had taken care of it". There is no affirmative proof that this defendant represented that he was authorized to discount $4,657.20 and accept a smaller amount in full settlement and payment of said note. Conversely there was no admissible evidence that this defendant was not authorized to do any or all of these things, thereby leaving unrebutted the presumption that all men are fair and just in their dealings with others.

For authority supporting the proposition that there exists a presumption that all men will do that which is right, and that their business dealings are in good faith, see 20 Am. Jur., Evidence, Sec. 229, p. 223, wherein it is stated:

> "The law presumes in favor of integrity of conduct. Generally speaking, in the absence of any proof to the contrary, there is a presumption that all men act fairly, honestly, and in good faith. The presumption is that an individual intends to do right rather than wrong . . . It is further presumed that men intend to do what

they have the right and power to do, rather than what is beyond their right and power."

In *State* v. *LaManca*, 142 W.V. 549, 96 S.E. 2d, 667 (1957) an embezzlement case wherein the indictment charged defendant with embezzling $998.00 of the prosecuting witnesses' money and the proof showed a failure to account for and pay over $930.63 at page 670:

> "The law in this regard is fundamental and, we might say elementary under Section 14 of Article III of the Constitution, 'the accused shall be fully and plainly informed of the character and cause of the accusation,' and the law is well settled that in any case in which a defendant is tried upon information or indictment, the accused must be so definitely informed of the charges against him that he may be protected against another prosecution for the same offense. While *immaterial averments may be included in or omitted from indictments without affecting the validity of indictments, yet if they are included, they may be misleading and unfair, and so prejudice the accused as to create a fatal variance.*" (Emphasis supplied)
>
> . . . .
>
> "*The question is not one solely for a determination by the jury when the proof is entirely contrary to the charge contained in the indictment.*"

For the convenience of the Court there is here set out excerpts from the testimony showing the proof offered in support of the allegations contained in the indictment.

At (T31-32):

The witness Goff on direct:

"A. Mr. Archie Goldfon came to my place

and talked to me about putting aluminum siding on my house and putting up two porch roofs . . ."

"The Court: Who is "he"? And "he" told you?

"A. He looked at the house and gave me a price on it . . . and he gave me a price of $3,450.00.

* * *

"Q. Not what he said. Was the work to be financed or how was it to be paid for?

"A. That was financed . . . our payments were to be $15.00 or $20.00 per month . . ."

At (T77):

The witness Goff on cross examination:

"Q. Who is Mr. Goldfon?

"A. He represented himself to me to be Manager of the Universal CIT Credit Corporation in Pittsburgh".

On direct examination, at transcript page 51, Goff on direct examination testified as follows:

"A. Mr. Tyler came down and I showed him the papers and asked him about them and told him we were to pay cash for the job when it was completed, or within 15 to 60 days after completion, and that it was not to be financed, and he said don't worry about it, I will take care of it.

* * *

"A. That was in November.

"Q. What part of November, the best you can remember?

"A. Not later than the 15th."

At (T53). Goff testified of a second conversation:

"Q. Did George Tyler make any statement in this connection as to what if anything had been done with reference to Universal CIT Corporation.

"A. He said he had taken care of it.

"Q. In what month and year did that conversation take place?

"A. That would have been in November, 1959.

At (T90):

Prosecuting witness, Goff, on cross examination:

"A. I asked him if I would pay cash if it would be a difference in the price on it . . ."

At (T53):

"A. On the 15th of December Mr. Tyler came down and they wanted to run the concrete porch . . . and it was freezing weather and I wouldn't let them do anything, told him I would like to hold the cement work up , . ., and Mr. Tyler agreed to come down to $3200 on the contract on the house for this work if I would pay cash; and he came on the 15th of December and told me that if I would finish the porch, lay the blocks and run the concrete on the porch that he would cut the job to $3000.00 and wanted to know what part of it.

"Q. Did you agree to do that?

"A. I did.

* * *

"A. . . . I told him I could give him a check for $1600.00 then and the other $1400.00 in 45 to 60 days and he agreed to it."

At (T109) (T110):

"Q. Now what was Mr. Tyler supposed to do to get the balance?

"A. He was supposed to have me a release from the G. T. Aluminum Company, a statement that the $1400.00 would pay the balance in full on the work done on the property.

* * *

"Q. And all he had to do was to give you a release?

"A. Yes sir, give me a release, a statement from the Finance Company, that they had no liens against the property.

"Q. You mean the Universal CIT Credit Corporation?

"A. Yes sir."

"Q. And that was the understanding you made with him on the 15th day of December, 1959?

"A. Yes sir."

The witness Goff agreed to this and testified that he gave defendant his check for $1600.00 agreeing to pay the balance of $1400.00 in 45 to 60 days. He (Goff) further testified that it was his understanding with defendant at the time he delivered the check that the balance of $1400.00 would be paid when defendant presented him a release from Universal CIT Credit Corporation. From this evidence adduced on behalf of the State it is apparent that this testimony does not show beyond a reasonable doubt that defendant falsely represented he had paid off any note; nor does it show beyond reasonable doubt anyone of the alleged false

representations charged against defendant in the indictment.

This is further shown by the testimony of Goff at (T101):

> "A. Didn't understand he was to get it for me. The finance papers he was supposed to have taken care of them. Mr. Coffindaffer said he would have to have a release or a statement from the Universal CIT Corporation. I had told him about the papers and that Mr. Tyler had taken them and said *he was taking care of them . . .*" (Emphasis supplied)

(T102):

> "Q. When did Mr. Coffindaffer give you that information?
>
> "A. *Along the first of January* when I talked to him about the loan. I talked to him different times. (Emphasis supplied)

Certainly the fact that in January 1960 the prosecuting witness admitted in his conversation with Mr. Coffindaffer that at that time the defendant was taking care of them, evinces nothing falsely stated by defendant and further denotes no reliance on any such statement when the check was given some half month before; such testimony denotes nothing more than a promise to do something in the future.

In a case such as this it is incumbent upon the State to show beyond a reasonable doubt *an actual fraud perpetrated. State v. Pishner*, 72 W. Va. 603, 78 S.E. 752 (1913). The indictment charges "did fraudulently . . . with intent to defraud"; where is the State's evidence of an actual fraud?

The record reveals that the witness Goff, turned over to defendant his check for $1600.00; the record is abundantly clear that $1600.00 was paid to the Universal CIT Credit Corporation. Looking at the overall transaction, we observe that Goff contracted to have remodeling work done on his house and that his agreement in this regard was initially with a person named Goldfon who from the record was a manager of Universal CIT Credit Corporation, and it was agreed that the transaction would be financed. It is clear from the record that Goff received all the benefits of his contract for home remodeling and made no complaints whatever with the manner in which the work was done or with the completed work. The record further indicates that Goff found defendant and his workmen agreeable. Certainly Goff didn't hope to have defendant expend his time, materials and labor without remuneration. Goff was well aware that he owed for the work done. Every cent that he paid defendant was applied to that debt.

How was Marshall Goff defrauded? He got his home completely remodeled — $3,000.00 worth of work, labor and materials for $1600.00. The defendant got nothing — not only did defendant turn over the $1600.00 to Universal CIT, but he also paid off the entire note. It is respectfully submitted that before a party can have been defrauded it is necessary that he have sustained some detriment. *Hubbard* v. *Commonwealth*, 201 Va. 61, 109 S.E. 2d 100 (1959).

There is no question that at the time Marshal Goff turned over to defendant his check for $1600.00 he was indebted in excess of that amount to either the defendant or to the Universal CIT Credit Corporation; that

the check for $1600.00 was turned over to defendant to apply on the very debt is unquestioned. The facts are undisputed that it (the check) was given in partial payment of Goff's debt arising out of the work done on his home, the benefits of which he reaped. The facts are equally undisputed that it (the check) was applied to the very purpose for which it was given.

The record is abundantly clear that Goff expected to pay the balance of $1400.00 to defendant upon receipt of a release from Universal CIT. Is it not a fair and reasonable inference to ascribe that Goff knew that the account was still with Universal CIT when he turned over the check to defendant? Isn't this inference strengthened by Goff's testimony that he told Mr. Coffindaffer, in January, 1960 (the check was given December 15, 1959), that Mr. Tyler took the papers and said "*he was taking care of them*".

Carrying the inference to its logical conclusion, and interpreting the evidence in the light most favorable to the accused, it is respectfully submitted that Goff did know Universal CIT was financing the account and he gave defendant his check for the very purpose of applying the check as payment on the CIT account.

Counsel for defendant humbly urges this Court that no wrong of defendant has been proven beyond a reasonable doubt. There was no detriment to the prosecuting witness, Goff, and no benefit obtained by the accused. The State failed from all the evidence adduced herein to establish beyond a reasonable doubt an actual fraud perpetrated on Marshal Goff.

What evidence is there that Goff relied upon the alleged misrepresentation? According to Goff's testi-

mony the alleged statement was made not later than November ~~20, 1~~959. He parted with the check on December 15, 1959 after having bargained with defendant for a reduction in price. Goff admits that the balance of $1400.00 was to be paid in 45 to 60 days and upon receipt of a release from Universal CIT Credit Corporation. He further admits in his conversation, in March, 1960, with Mr. Coffindaffer that defendant at that time "*was taking care of them*", here referring to the Universal CIT papers.

The inferences conclusively established by the State's own proof are that Goff knew when he gave defendant the check that Universal CIT was still in the picture; that Goff parted with the check for one reason, and one reason alone, that being to obtain the benefit of the reduction in price, which reduction he admits came about not at defendants' instance, but at his own.

It is inescapable that a note discounted by a finance company can be repurchased before maturity for an amount less than its face value. There is no direct evidence in the record to show that had Goff kept his word and paid the balance as by his agreement, defendant would not have been able to pay off the note. The mere fact of defendants' agreeing to reduce the price proves nothing consistent with guilt of obtaining a thing of value by false pretenses.

Looking to the other allegations in the indictment aside from the alleged representation that he had paid off a certain note, we find that defendant is charged to

have falsely and fraudulently represented the following:

1) that he was authorized by Universal CIT Credit Corporation to collect $4,657.20 from Marshal Goff;

2) that he was authorized by Universal CIT Credit Corporation to discount $4,657.20 and accept a smaller sum in full settlement and payment of said note and indebtedness;

3) that he was a representative, agent and employee of Universal CIT Credit Corporation.

In order to sustain a conviction for obtaining money under false pretenses the State must prove beyond a reasonable doubt that the victim believed the representation and was induced thereby to part with the thing of value. *State* v. *Pishner*, 72 W.Va. 603, 78 S.E. 752 (1913); *State* v. *Hurst*, 11 W. Va. 54.

The record discloses that the State's theory upon the trial of this case was to the effect that defendant falsely represented he had paid off the note thereby leading Goff to believe that he could pay over the money to defendant. While there is no affirmative evidence as to what induced Goff to give the check to defendant he testified at pages 54 and 55 of the transcript as follows:

(T. 54-55):

Q. Did you give him such a check?

A. I did.

Q. On that day, that is the 15th day of December, 1959?

A. Yes sir.

Q. At that time, did you think the Universal CIT Corporation had any interest in this contract or note that you had previously signed?

A. I did not.

If this be true, that Goff did not think that Universal CIT had an interest in the note when he gave the check (a point we do not concede, the record being replete with inconsistencies and contradictions), then it must conclusively follow that either the alleged representations regarding any authority given defendant by Universal CIT were not made, or if they were made the prosecuting witness did not believe them and was not induced thereby to part with anything of value. Had such representations been made defendant would have known of an interest claimed by Universal CIT. It is respectfully submitted that the State's attorney should not be permitted to assert a position not sustained by his proof.

It is further submitted that the State in its eagerness to find a crime where no crime was committed supplied these charges by virtue of hindsight and what might have been or what might have occurred and not from any facts upon which such charges could be based.

Nowhere in the record does the evidence show any representation by defendant that he was authorized by Universal CIT to collect $4,657.20 from Goff; nor that he was authorized by Universal CIT to discount $4,657.20 and accept a smaller sum in full settlement and payment of said note and indebtedness, nor that he was a representative, agent or employee of Universal CIT Credit Corporation. The prosecuting witness at no time so testified nor is there any indication

from any of the witnesses presented by the State that the defendant, George Tyler, ever represented any of these matters.

It is most sincerely urged that the proof in the court below being what it is, the inclusion of these charges, not proved, in the indictment were calculated to have and did have such a grossly misleading affect upon the jury as to prejudice and render impossible a fair verdict. That these variances of the charges with the proof when viewed in the light of the State's burden to prove defendant's guilt of the offense charged beyond reasonable doubt constituted irrevocable prejudicial reversible error.

It is defendant's contention that the matters and things alleged in the indictment were material and that the State by failing to prove them failed in its burden of proving defendant guilty as charged beyond a reasonable doubt. But even were the allegations to be considered not material, the Court's attention is invited again to the language of *State* v. *LaManca*, 142 W.Va. 549, 96 S.E. 2d 667 (1957), at page 670:

> "*While immaterial averments may be included in or omitted from indictments without affecting the validity of indictments, yet, if they are included, they may be misleading and unfair, and so prejudice the accused as to create a fatal variance.* (Emphasis supplied)
>
> * * *
>
> "*The question is not one solely for a determination by the jury when the proof is entirely contrary to the charge contained in the indictment.*" (Emphasis supplied)

In *State* v. *McGraw*, 140 W.Va. 547, 85 S.E. 2d 849 (1955), this Court quoted with approval from the text-writer Bishop as follows:

> "If the indictment sets out the offense as done in a particular way, the proof must show it so, or there will be a variance."

In *State* v. *Myers*, 118 W.Va. 397, 190 S.E. 678 (1937), the indictment charged that the assault for which the accused was being tried was made with a knife. All the evidence, however, indicated that the assault had been made with a blunt instrument.

The Court recognized that a description of the instrument could have been left out of the indictment, but if it is averred, it becomes quite material,

> "because of the fact that by putting it in the accused is notified that his conviction will depend upon the proof of the matters alleged. He is entitled to prepare his defense accordingly. To allege one thing and try him for a different thing is misleading and unfair. Illustrative of this principle is the descriptive matter that may be put in an indictment but which may also be dispensed with. It isn't necessary in an indictment for larceny to allege that the object stolen was a bay horse with a blazed face and three white feet. However if the indictment does so allege, proof at the trial that a white horse was stolen must be excluded. The variance between the proof offered at the trial and the averment contained in this indictment, we think is fatal, and for that reason the judgment . . . will be reversed."

Subsection (d), Point II:

> The evidence conclusively shows that defendant turned over the money given to him by the prose-

cuting witness to the Universal CIT Credit Corporation to be applied on the debt of the prosecuting witness, Goff, to Universal CIT Credit Corporation.

Witness Marshal H. Goff, on cross examination: (T. 114):

"Q. Has someone been paying money to the Universal CIT Corporation?

"A. Yes sir.

"Q. And it was not you?

"A. It was not me."

Witness Lloyd F. Craig, on cross examination: (T. 142-143):

"Q. Prior to that time several payments had been made on the note. Do you know how much had been paid on the note in installment form?

* * *

"A Through August 30, 1960, there had been payments totalling $1600.00 paid.

"Q. As of August 15, 1960, were these payments called for fully paid to date?

"A. Yes sir."

With evidence such as this no payments having been made by Marshal Goff to Universal CIT Credit Corporation and the facts showing $1600.00 paid to defendant and the exact figure of $1,600.00 having been paid to Universal CIT Credit Corporation in accordance with the terms of the note, there is no doubt that the money received by defendant was applied on the debt to Universal CIT Credit Corporation. This money had been paid to Universal Credit Corporation long before any

warrant, complaint or indictment. Marshal Goff's account was credited with this amount. Does such conduct on the part of defendant evince any intent to deprive Marshal Goff of $1600.00? We submit that it does not. Wherein was Marshal Goff injured. He owed the debt to the extent of $3,000.00, this cannot be denied. The record does not show that defendant was in any way encouraged or forced to pay over the $1600.00 to Universal CIT Credit Corporation. If his intent was to defraud Marshal Goff, why didn't he just cash the check and keep the money? Neither does the record show that defendant would not have paid off any excess over $3,000.00 owed to Universal CIT Credit Corporation, had there been such excess.

The State's evidence is incomplete; too many questions are left unanswered. It fails to show either an intent to defraud or an actual fraud perpetrated, two essential elements, proof of which are necessary to sustain the conviction. *State* v. *Pishner*, 72 W.Va. 603, 78 S. E. 752 (1913).

Subsection (e), Point II:

The State failed to prove the corpus delecti.

It is recognized by counsel for defendant that the errors assigned involve an overlapping and duplication.

The body of the crime of obtaining money or a thing of value by virtue of false pretenses necessitates proof beyond a reasonable doubt of the following:

1) a false statement or representation of a present material fact which is known to be false by defendant;

2) made for the purpose of perpetrating a fraud; and with the present intent of accomplishing a fraud;

3) believed and relied upon by the prosecuting witness and serving as an inducement to his parting with the property, and

4) resulting in an actual fraud accomplished.

State v. *Hurst*, 11 W.Va. 54; *State* v. *Pishner*, 72 W.Va. 603, 78 S.E. 752.

Without proof beyond a reasonable doubt of each and every one of the above, the fact of crime is not established.

The corpus delecti is the fact that the crime charged has been actually perpetrated. It consist not merely of an objective crime, but of the criminal agency of another in the crime. It is a material and essential element of the crime and must be established as the first and indispensible fact.

It is contended that the mere act of obtaining the check from Goff in the present case does not show the fact of crime but all the necessary elements requisite to making that act of obtaining the check by virtue of false pretenses must be shown and this beyond a reasonable doubt.

In *State* v. *Parsons*, 39 W.Va. 464, 19 S.E. 876 (1894), an arson case, the law is stated in the syllabus as follows:

> "Both the corpus delecti, or criminal act and the agency of the accused in such act, must be proven before the jury beyond a reasonable doubt."

The law is clear that where the corpus delecti is attempted to be proved by circumstantial evidence it must

do so to "the full assurance of moral certainty." See *State* v. *Toney*, 98 W.Va. 248, 127 S.E. 35. The proof must be to the exclusion of every reasonable hypothesis consistent with innocence.

It is respectfully urged that the proper setting for the matters in difference, if any, between the witness Goff and defendant would have been a civil court and should not have been in the criminal court of Harrison County, no crime having been committed by this defendant and further no crime having been proved.

Subsection (f), Point II:

> The proof as offered by the State fails to establish beyond reasonable doubt any false pretense or representation made by defendant.

The record herein discloses that defendant is alleged to have stated in November, 1959, "I have taken care of it" during a discussion with the prosecuting witness, Goff, regarding the financing of certain home remodeling; Goff's wife, Mrs. Goff, after much prompting and effort on the part of the prosecuting attorney places the alleged statement on December 15, 1959.

Marshall Goff on direct examination:

(T. 52-53):

> Q. And what was the conversation on that occasion; what did you say and what did the defendant George Tyler say?
>
> A. I told him I could make arrangements through the Baltimore Land Bank to get the money to pay for the job and the porches and the awnings when the job was completed, and I told him I could finance it through them.

Q. Did George Tyler make any statement in this connection as to what if anything had been done with reference to the Universal CIT Credit Corporation?

A. He said he had taken care of it.

Now the record does reveal that Goff made application for a loan and it was during his discussion with Mr. Coffindaffer of the Land Bank that he contradicts his previous testimony. The Court is here referred to the statement of Goff to Mr. Coffindaffer in March, 1960, that defendant had said "he was taking care of them." (T. 101-102).

The record is totally silent as to what "I have taken care of it" meant either to Goff or to defendant.

It is pointed out that in order for the statement to be false, the only meaning that could be ascribed to the statement is that it means "I have paid." But such is not the case. The record nowhere reveals any agreement or understanding between defendant and Goff expressly setting out that Goff should obtain financing elsewhere. From Goff's testimony set out above that he told defendant that he could finance it through the Land Bank, the statement "I have taken care of it" could very reasonably have meant "you don't have to finance it through the Land Bank, Mr. Goff, "I have taken care of it", i.e. obtained the financing through Universal CIT Credit Corporation for you.

The defendant in this case has been tried for a statement taken completely out of context of his discussion with Goff, a statement that was presented to the jury devoid of the numerous connotations and inflections

that may have been imparted to it; and in addition some 14 to 16 months after it was made, if it was made at all.

It is respectfully submitted that the statement "I have taken care of it" is not such statement as should ever be the foundation for a criminal prosecution such as this. Especially is this true in this particular case where the evidence of the man to whom the statement was allegedly made is so filled with contradictions.

Again we reiterate, the statement "I have taken care of it" can mean anything or it can mean nothing. If the statement was intended by George Tyler to mean something other than "I have paid off the note" and there is no evidence that it was not, then there is absolutely no evidence that the statement was false.

To sustain the conviction, it was incumbent that the State prove beyond reasonable doubt the pretense was false, the State failed in this burden.

Subsection (g), Point II:

> The evidence of the State fails to show beyond a reasonable doubt the requisite criminal intent on the part of defendant.

Where the indictment is for obtaining goods by false pretenses, it must aver fraudulent intent, and the State must prove it. It is the very gist of the offense. The Criminal Trial in the Virginias, Howard B. Lee, Sec. 649, 650, p. 367.

The facts as brought out by the evidence in the trial court below conclusively show the failure of the State to sustain its burden in proving criminal intent.

The witness, Goff, testified that at his instance defendant agreed to reduce the price for the work. But even were we to assume defendant urged Goff to pay cash and thereby obtain the reduced price what criminal intent does this show? While the record does not indicate, presumably the defendant was acquainted with the financing business. Certainly defendant had knowledge that Goff's note could be bought back from Universal CIT Credit Corporation and it is common knowledge that if a note is paid off prior to maturity the interest and carrying charges are eliminated, thereby making the payoff less than the face of the note.

It is respectfully submitted that in order to sustain its burden of proving intent the State had the burden of conclusively showing an intent to unlawfully deprive Goff of his $1600.00. The evidence does not bear out such intent. All the money received by defendant from Goff was credited to Goff's account at Universal CIT Credit Corporation; the defendant obtained for himself none of the monies.

Again we set out the testimony of Lloyd Craig:

(T. 142-143):

"A. Through August 30, 1960, there had been payments totalling $1600.00 paid.

"Q. As of August 15, 1960, were these payments called for fully paid?

"A. Yes sir."

And a portion of Goff's testimony:

(T. 90):

"A. I asked him if I would pay cash if it would be a difference in the price on it . . ."

It is strongly contended here that the aforesaid evidence alone goes far to negative any criminal intent on the part of defendant.

There is no question that the payment of cash would make a difference in the price. Defendant asserted no falsehood in that regard. The note could have been picked up from Universal CIT Credit Corporation upon a cash payment of much less than the face of the note. The mere fact of agreeing to reduce the price for the work evinces absolutely nothing, other than defendant's knowledge of this fact.

What fraudulent intent is shown by the record to injure or deprive Marshal Goff of anything rightly his? Absolutely none. The record is amply clear that Goff gave defendant $1600.00 as partial payment on the work done on his home. The record shows that the $1600.00 was applied to that very purpose.

Again it is pointed out to the Court that the transcript is a mass of conflicting assertions; especially the testimony of the witness, Marshal Goff. His testimony at one point is that he dealt with Goldfon, a representative of Universal CIT Credit Corporation and agreed with him that the transaction was to be financed. He next testifies that he told defendant it was not to be financed; he then tells defendant he can get it financed through the Baltimore Land Bank; he testifies that defendant then said "I have taken care of it"; he then testifies that he gave defendant his check not knowing Universal CIT Credit Corporation claimed an interest in the note; and he then testifies that on this occasion when he gave defendant his check, his agreement was to pay defendant the balance upon receipt of a release

from Universal CIT Credit Corporation. He then testifies that while talking to Mr. Coffindaffer in March, 1960 (this would be at least two weeks after he gave the check), that he told Mr. Coffindaffer, defendant had stated "he was taking care of them."

The conflicting testimony presented by the State offers no basis upon which any finding of criminal intent could be made. The evidence reveals, on the other hand, ample proof that there was in fact no criminal intent on the part of defendant. The State failed to sustain its burden of proving the requisite criminal intent.

Subsection (h), Point II:

> The proof as offered by the State fails to show that the prosecuting witness was actually defrauded.

The Court's attention is here directed to Subsection (d), Point II, of defendant's brief herein.

Subsection (i), Point II:

> The State offered no admissible evidence that defendant was not authorized to deal with Goff and accept payment from him.

The witness, Lloyd Craig, testified at pages 134 and 135 of the transcript and over the objection of defendant that defendant was not authorized to deal with Goff with respect to the Goff note.

This testimony highly prejudicial and improper when viewed together with the charges laid in the indictment and unproved, was calculated to and could

have had no other effect than to mislead the jury to defendant's prejudice.

The record clearly shows that the alleged representations of defendant that he was authorized by Universal CIT Credit Corporation to collect $4657.20 and to discount $4657.20, and to accept a lesser sum were not proven by the State. The record further reveals that the State in effect abandoned these alleged pretenses. Whether or not the defendant was authorized by Universal CIT Credit Corporation resolves itself into a question of agency.

To permit the witness, Craig, to testify over defendant's objection that defendant was not authorized and that he was not a servant, agent or employee of Universal Credit Corporation was to permit Craig to testify to a matter that should have been resolved by the Court and not the jury. Further, there was no evidence that defendant represented he was so authorized, and consequently Craig's evidence is therefore immaterial.

In *Bank of White Sulphur Springs* v. *Lynch*, 93 W. Va. 382, 116 S.E. 685 (1923), syllabus 3, it is stated:

> "Where the facts are undisputed, the question of agency arising therefrom should be determined by the court and not submitted to the jury."

The testimony of Craig in this regard was a legal conclusion which was not competent and should have been excluded.

In addition to this testimony being a legal conclusion and inadmissible for that reason, it was also inadmissible for the reason the State failed to lay a proper foun-

dation for such evidence; no evidence was offered that if defendant had been authorized by Universal CIT Credit Corporation to do any of the things alleged in the indictment the witness Craig would of necessity have known of such authorization.

Subsection (j), Point II:

> The proof as offered by the State established that defendant did nothing more than collect a part of a debt justly owing by the prosecuting witness, Goff.

The evidence as shown by the transcript discloses that on two occasions or on at least one occasion an agreement was made between the defendant and the prosecuting witness, Goff, to reduce the price for the work. At the time of and prior to these agreements or this agreement, the witness Goff had paid nothing on the initial debt.

Even were we to assume that defendant flagrantly misrepresented to Goff that Universal CIT Credit Corporation had been take care of, there was still ample consideration to support the new agreement. There is no dispute that the new agreement obligated Goff to pay the sum of $3,000.00. There is nothing in the record to indicate that Goff would be held responsible for anything more than this amount even though the account remained with Universal CIT Credit Corporation. Goff by virtue of the new arrangement now owed a debt of $3,000.00; the defendant in accepting $1600.00 from him merely accepted part payment of that debt.

In *State* v. *Williams*, 68 W. Va. 86, syllabus 2, it is said:

> "One who obtains possession of property upon the pretense of buying it for cash at an agreed price for the purpose of payment of a just debt then due by the owner, equal to or greater in amount than the price of the property is not guilty of a statutory crime." See also *State* v. *Hurst*, 11 W. Va. 54.

It is strongly contended that there was due and owing by Goff the sum of $3,000.00 and from his testimony it is impossible to say that he didn't believe that sum was owing to Universal CIT Credit Corporation. We digress again to point out the fact that when he gave the check to defendant and promised the balance, he was waiting upon a release from Universal CIT Credit Corporation, and further, his testimony about his conversation with Mr. Coffindaffer in March, 1960 to the effect that defendant had told him "he was taking care of them."

The witness Lloyd Craig on cross examination:

(T. 142):

> "Q. And any time that this note was purchased from the date of it until 80 successive monthly installments had been paid, this note could have been purchased for some figure less than $4657.20?
>
> "A. Yes sir.
>
> "Q. Would you have permitted Mr. Tyler to buy this note from you.
>
> "A. Yes."

It is respectfully submitted that defendant at any time could have repurchased the note from Universal

CIT Credit Corporation; the sooner he could do this the less he would have to pay. He was aware of this. Goff owed the debt of $3,000.00 to defendant, had he paid it as by his agreement with defendant, the note would have been cancelled. The check obtained by defendant was applied to that very debt.

The facts of the present case when looked at in the light of the law of this State that one who obtains property by virtue of a false pretense to apply on a just debt owing by the owner is not guilty of a crime, dictate that the indictment should have been dismissed and a directed verdict of acquittal entered.

Subsection (k), Part II:

> The proof as offered on behalf of the State conclusively shows no detriment to the witness, Goff, and no benefit to the defendant resulting from the alleged pretense.

The Court's attention is here directed to the point and arguments made in subsections (a), (b), and (c), Point II, and further to those points and arguments made in subsection (d), Point II of this brief.

By way of summary suffice it here to say that Goff owed a debt for home remodeling work; he gave defendant $1600.00 to apply on that debt; the $1600.00 was applied on that debt. Goff reaped the benefits of his home remodeling and in the language of *Hale* v. *Hubbard*, 201 V. 61, 109 S.E. 2d 100 (1959), at page 104 of the South Eastern Reporter, did not part with value "*without compensation.*" (Emphasis supplied)

In any event, counsel for defendant here adopt the points and arguments heretofore made on this point.

Subsection (1), Point II:

> The proof of the State conclusively shows that on December 15, 1959, when Goff gave defendant his check for $1600.00, the witness Goff, did not believe the alleged representation of the defendant, and did not rely on any alleged representation of defendant, but to the contrary was not going to pay the balance of $1400.00 until a release was received from Universal CIT Credit Corporation.

Counsel for defendant will not burden the Court to again set out the testimony of Goff in this particular, said testimony in this regard having been heretofore set out.

Suffice it to say at this point that it is most incredible to assume that defendant did not know Universal CIT Credit Corporation claimed an interest when by his own testimony he admits that when he gave the $1600.00 check to defendant, his understanding was he would be given a release from Universal CIT Credit Corporation when he paid the balance. Therefore, he could not have relied on any statement of defendant nor believed that Universal CIT Credit Corporation had ben taken care of.

Subsection (m), Point II:

> Any representations of defendant were that something would be done in the future, and not of a present fact and therefore defendant could not be guilty of obtaining money under false pretenses.

Counsel for defendant concedes that testimony was offered to the effect that defendant stated "I have taken care of it", or "that he had taken care of it."

However, this testimony can hardly be considered conclusive on the point inasmuch as there was no conclusive evidence as to when the statement was made, if it was made. However, Mr. Goff in response to a question on direct examination said:

(T. 51):

"A. Mr. Tyler came down and I showed him the papers and asked him about them and told him we were to pay cash for the job when it was completed, or within 45 to 60 days after completion, and that it was not to be financed, and he said don't worry about it, *I will take care of it.* (Emphasis supplied)

Mr. Goff went on to testify that this occurred not later than the 15th of November, 1959.

On cross examination Goff testified:

(T. 101-102)

"A. Didn't understand he was to get it for me. The finance papers he was supposed to have taken care of them. Mr. Coffindaffer said he would have to have a release or a statement from the Universal CIT Corporation. *I told him about the papers and that Mr. Tyler had taken them and said he was taking care of them.* . . . (Emphasis supplied)

"Q. When did Mr. Coffindaffer give you this information?

"A. *Along the first of January* when I talked to him about the loan. . . ."

The facts are undisputed that Mr. Goff gave defendant the check for $1600.00 on December 15, 1959. Now, if in January, 1960, the witness Goff was under the impression that defendant had stated "he was taking care of them", or "I am taking care of it." As the above testimony would indicate then there was no representation of a past or existing fact.

In *Hubbard* v. *Commonwealth*, 201 Va. 61, 109 S.E. 2d 100 (1959), at page 104 of the South Eastern Reporter, the following is found:

> "A criminal false pretense has been defined to be "*the false representation of a past or existing fact*, whether by oral or written words or conduct, which is calculated to deceive, intend to deceive, and does in fact deceive, and *by means of which one person obtains value from another without compensation.*" 35 C.J.S., False Pretenses, Section 1, p. 636. According to the definition *the false pretense must be a representation as to an existing fact or past event. False representations amounting to mere promises or statements of intention have reference to future events and are not criminal within the statute*, even though they induce the party defrauded to part with his property. 22 Am. Jur., False Pretenses, Section 14, p. 452; 35 C.J.S., False Pretenses, Section 8, 846." (Emphasis supplied)

In order to sustain its burden, the State is required to prove beyond a reasonable doubt a false representation of a past or existing fact by means of which one person obtained value from another without compensation. The State did not sustain this burden.

Subsection (n) Point II.

The trial court committed reversible error in permitting the State's attorney to indulge in improper and prejudicial argument and in permitting the State's attorney to misstate the evidence over the objection of defendant.

In closing argument the prosecution, over the objection of the defendant was permitted to argue that the defendant had sold the original promissory not to Universal CIT Credit Corporation and had received the difference between the original contract price and "the $4600 and some dollars that the note was for".

The argument referred to is here set out:

(T236)

"... He got money for the note sold to the Universal CIT Corporation that Mr. Craig testified was purchased by them I believe on the 9th of November, 1959, $4650 some dollars, which included 6%, and included 1% insurance fee, but I think we may assume, we don't have the exact figures, but I say in argument I would assume it amounted to the difference between $3,450, which was the original price of this work, and the $46000 and some dollars that the note was for. The note $4,657.20 endorsed G. T. Aluminum Company, George Tyler, owner. Where did the money go?

"Mr. Wilson: Objected to; there has been no testimony here that other money went any place. That is highly improper argument in the closing of the prosecution's case.

"Mr. Hutton: I submit the testimony is the Universal CIT Credit Corporation bought this

note from the G. T. Aluminum Company on the 9th of December.

"Objected to. Overruled.

"Exception.

"Now he says on the 15th day of December he got $1600 of the $3000, so it has not been paid yet, but he has been paid for the discount value of that note by Universal CIT Credit Corporation on either the 8th or 9th of November, 1959.

"Mr. Wilson: Same objection.

Overuled

Exception

"Mr. Hutton: And after that he got $1600 from the complaining witness Marshal Goff on the 15th day of December, 1959. Mr. Wilson said he did this work and it was worth at least $3000.00. but he only got $1600.00. That is not true.

Mr. Wilson: Same objection

Overruled

Exception

The above argument was in direct conflict with the only positive testimony on the point.

Lloyd F. Craig called as a witness on behalf of the State testified:

(T129):

"Q. Will you please, for the purpose of refreshing your recollection, look at the file and tell the jury if you can at what time this note (and I am handing you herewith copy of the

original) was purchased by Universal CIT Credit Corporation?

"A. One check November 9th, 1959.

"Q. To whom was that check payable?

"A. G. T. Aluminum Company."

On the value of the note the only testimony offered by said witness, and thus the only testimony in the trial was as follows:

(T141-142):

"A. . . . , the charges would have been appreciably less if they were paid in March, 1961, or a subsequent date from January.

"Q. And the amount that you would have obtained for this note would have been substantially less than $4,657.20?

"A. Yes, sir."

Nowhere does it appear from the transcript that any evidence was offered as to the amount defendant received from Universal CIT for the note. Thus, the State's attorney was permitted to argue a material fact which, as argued, was in direct conflict and totally unsupported by any evidence in the case.

The general rule regarding such argument is set forth in 23A CJS, Criminal Law, Sec. 1094, pp. 150-153.

"It is improper for counsel to comment on matters not sustained by the evidence, or to state his own knowledge of the fact, or to insinuate he has such knowledge, accordingly it is improper conduct for either the prosecuting attorney or the counsel for accused in his argument to assert or to refer to facts and circumstances as being

in the case where they are not reasonably shown by the evidence . . ."

The same rule applies in West Virginia. In State v. Bragg 140 W. Va. 585, 87 S.E. 2d 689 (1955), this Court stated the rule as follows at page 708:

> "Again it becomes the duty of this Court to caution the prosecuting attorneys of this State against the use of their positions in the trial of criminal cases by referring to their argument to the jury to matters which are extraneous to the record. In the case at bar the Prosecuting Attorney of Kanawha County in his argument to the jury told the jury how the killing of Gullett took place, when a careful review of the record discloses that there were no facts contained therein justifying the remarks of the prosecuting attorney."
>
> * * *
>
> "In the case at bar the prosecuting attorney had no right to make the statements to the jury above quoted. In doing so, even if there were no other error in the case at bar, his action in that regard would have constituted reversible error."

In state v. Moose, 110 W. Va. 476, 158 S.E. 715 (1931) the syllabus provides:

> "An attorney for the state may prosecute vigorously as long as he deals fairly with the accused; but he should not become a partisan intent only on conviction. And it is a flagrant abuse of his position to refer in his argument to material facts outside the record or no fairly deducible therefrom."

The Court's attention is further directed to the case of *Crum* v. *Ward*, W. Va. , 122 S.E. 2d 18 (1961) syllabus 3 of the court is as follows:

> "Though wide latitude is accorded counsel in arguments before a jury, *such arguments may not be founded on facts not before the jury, or inferences which must arise from facts not before the jury.* (Emphasis supplied)

Certainly if this be the law in a civil case, the rule should be applied even more stringently in a criminal case where the liberty of the accused is at stake. There is no question that the jury improperly led to believe that defendant received a large sum of money from Universial CIT Credit Corporation in addition to Goff's $1600.00 would feel prejudiced against the defendant. It is pointed out that the argument made in the case of Crum v. Ward, W. Va. , 122 S.E. 2d 18 (1961) a civil case was held prejudicial; certainly the argument by the prosecutor in this criminal prosecution not suported by an iota, of evidence and permitted over defendant's objection constituted prejudicial error.

Counsel for defendant in his petition has set out some exerpts from the argument of the prosecuting attorney which were not objected to. We here refer to the State's attorney's account of what was said in the alleged telephone conversation between the prosecuting witness, Goff and the defendant.

The State's attorney argued as follows:

(T215):

"I a few days George Tyler called the Goffs

and said Mr. and Mrs. Lewises' names are not on the note. The record shows they are part owners of the property. Mr. Goff said that has nothing to do with this, it is not necessary for them to sign, because our agreement is the work is to be paid for after its completion or from 45 to 60 days thereafter."

The testimony of Goff with regard to the telephone conversation was as follows:

(T34-36):

"A. He called me the next morning, as nearly as I can remember and told me. . .

Mr. Wilson: Objected to, your Honor . . . and certainly a background must be laid for any such and it has not be laid . . .

* * *

"Q. On the 4th of November, 1959, did you have a telephone conversation with a person representing himself to be George Tyler?

"A. I did.

"Q. Who did this person who called you on the telephone say he was?

"A. George Tyler, said he was George Tyler of the G. T. Aluminum Company.

"Mr. Wilson: Objected to . . . I move to strike the last answer and ask the Court to instruct the jury to disregard it.

"Overruled.

"Exception.

"Q. What was discussed in that telephone conversation?

"A. Mr. Tyler ---

"Objected to.

"The Court: Mr. Goff, don't go into a lot of conversation."

Goff then gave the following account of the telephone conversation, which account is by no means like that argued by the prosecuting attorney.

(T36):

"A. I was informed on the telephone that this property had Barbara Lewis and William Lewis's names on it as part owners and their names was not on the contract and note."

Goff then testified as follows at page 37 of the transcript.

(T37):

"Q. At the time of this telephone conversation and talk about the names being omitted from the contract, was anything said about the promissory note?

"A. Was not."

The Court is here referred to page 34-36 of the transcript and the improper testimony of Goff over the objection of defendant, relating to the alleged conversation.

A review of Goff's account of that telephone conversation, when contrasted with the prosecutor's account of the conversation as given in his final argument, would lead one to believe the State's attorney was discussing the facts of an entirely different case.

Nowhere in that alleged conversation does the witness Goff say that he told defendant that the signatures of the Lewises were not necessary because our agree-

mnt is that we will pay cash upon completion of the job or within 45 to 60 days; but testified to the exact contrary, as is shown at (T37) set out above.

Counsel for defendant are aware of the requirement that such argument should be objected to in order to be considered in the appellate court. However, the Court's attention is referred to these portions of the argument of the State's attorney not objected to for the purpose of showing the commulative effect of this type argument as it bears on those improper portions of the State's attorney's argument which was objected to. Counsel has not endeavored to pick out all the improper argument but contends that the entire argument of the prosecutor was interspersed with statements most prejudicial to defendant.

Even if it be determined that such is not the case, counsel for defendant, strongly urge that the prosecutor's argument which was objected to was improper, was prejudical and constituted reversible error.

The questions raised are of great general and public interest.

Certainly the authors of the Amendments to our Constitution intended that the safeguards of life, liberty, and the pursuit of happiness were the chief attributes of a free people, that these safeguards were to be most jealously guarded and that no man be he ever so small should ever in a free nation be deprived of these without due process of law. Hence were written the adopted Amendments 5, 6, and 14 of our Constitution.

The rules insisted on by your petitioner are fundamental and throughout the nation universally followed. May they remain the law.

CONCLUSION

It is respectfully urged that the 5th, 6th and 14th Amendments of our Constitution together with the precedents found within the realm of West Virginia law make it mandatory that the Supreme Court of West Virginia reverse the judgment of the Criminal Court of Harrison County, West Virginia, and return the same with instruction for acquittal, or in the alternative with direction for a new trial. We, therefore, respectfully submit that this Court should grant certiorari.

Respectfully submitted,

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(Certificate of Counsel on next page)

CERTIFICATE OF COUNSEL

I, W. DALE GREENE, one of counsel for petitioner herein do hereby certify that this said re-application is presented to this Honorable Court and not for any purposes of delay. The said petition filed herein is further certified by the undersigned to be restricted to grounds not heretofore presented, being, namely, Questions 1 and 3, and to the grounds presented under Question 2, which said ground was heretofore presented but was not fully developed as it might have been.

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